Supreme Court, U.S.
FILED
081238 APR 7 - 2009
OFFICE OF THE CLERK

(1)

No.

In The
Supreme Court of the United States

YURI J. STOYANOV,
Petitioners

v.

DONALD C. WINTER,
SECRETARY OF THE NAVY; ET. AL.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Yuri J. Stoyanov
7560 Pindell School
Road
Fulton, MD 20759
(301) 604-7615

QUESTIONS PRESENTED FOR REVIEW

Petitioner seeks decision to vacate the appeals court decision, which did not address any issue raised by Petitioner, but sanctioned wrong district court opinions that conflict and so far depart from this Court's decisions and decisions of the appeals courts as to call for an exercise of this Court's supervisory power. The conflicting and wrong reasons stated in the district court opinion and the appeals court decision present the following questions:

1. Whether Petitioner could establish a *prima facie* case of age discrimination based upon promotion selections?

2. Whether presenting evidence of disparate treatment and a pattern or practice of intentional discrimination because of age and retaliations for protected activities in addition to refuting Defendants' contentions are sufficient to defeat summary judgment.

3. Whether Petitioner provided sufficient evidence to establish pretext to defeat summary judgment?

LIST OF PARTIES

YURI J. STOYANOV,
Petitioner,
v.
DONALD C. WINTER, Secretary of the Navy;
STEPHAN W. PETRI, individually and in his official capacity as Head of Carderock Division Naval Surface Warfare Center;
GARY M. JEBSEN, individually and in his official capacity as Head of Code 70, Carderock Division Naval Surface Warfare Center;
KEVIN N. WILSON, Individually and in his Official Capacity as the Acting Head of Code 74 Carderock Division;
JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74 Carderock Division;
JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74 Carderock Division;
MATHEW CRAUN, Individually and in his Official Capacity as the Head of Code 722 Carderock Division;
PAUL SHANG, Individually and in his Official Capacity as the Head of Code 72 Carderock Division;
GERALD SMITH, Individually and in his Official Capacity as Deputy Head of Code 70 Carderock Division;
ROGER FORD, Individually and in his Official Capacity as the Head of Code 7014 Carderock Division;
M. KATHLEEN FOWLER, Individually and in her Official Capacity as Administrative Officer Code 709;
DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39;
JOSEPHINE MCGRATH, Individually and in her Official Capacity as Complaints Manager/Acting Deputy EEO Chief Code 034.

Respondents

CERTIFICATE OF INTEREST

The Petitioner Yuri Stoyanov certify the following:

1. The full name of every party or amicus represented by us is: None
2. The name of the real party in interest represented by us is: None
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us are: None
4. There is no such corporation as listed in paragraph 3
5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this court are: None

04/07/09 — Date

Yuri Stoyanov — Yuri Stoyanov

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1. U.S. Court of Appeals for the Fourth Circuit, Docket No. 08-2040, (1:06-cv-01244-AMD) Judgment January 15, 2009,. (Appendix page A1)

2. U.S. Court of Appeals for the Fourth Circuit, Docket No. 08-2040, (1:06-cv-01244-AMD) Unreported January 15, 2009, Unpublished Per Curiam Opinion (Appendix p. A2)

3. U.S. District Court Order denying Plaintiff's Motion to Reconsider the August 11, 2008 Order and Amend the Judgment, dated August 27, 2008, Docket No. 06-01244-AMD (Appendix p. A4)

4. U.S. District Court Order and Judgment dated August 11, 2008, Docket No. 06-01244-AMD (Appendix p. A5)

5. U.S. District Court Memorandum Opinion dated August 11, 2008, Docket No. 06-01244-AMD. (Appendix p. A6)

JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit issued Order denying timely petition for rehearing en banc on March 9, 2009 for Petitioner Yuri Stoyanov. The Supreme Court has jurisdiction in exercising its power of review of this matter pursuant to 28 U.S.C. 1253-1254. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED IN THIS CASE

Age Discrimination in Employment act of 1967, 29 U.S.C. 621 et seq. ("ADEA"); Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et. seq. ("Title VII"); Whistleblower Protection Act, 5 U.S.C. 2302(b)(8) ("WPA"); 5 U.S.C. §§2301-2302; 42 U.S.C. §1983.

STATEMENT OF THE CASE

Petitioner Dr. Yuri Stoyanov submits for the Court's consideration and decision to vacate the appeals court decision, which sanctioned a decision by a lower court that conflicts and so far departs from this Courts' decisions as to call for an exercise of this Court's supervisory power. The appeals court for the fourth circuit did not address any issue raised by Petitioner, but sanctioned wrong and erroneous reasons stated in the district court opinions that conflict with the relevant decisions of this Court and decisions of other appeals courts. Facts presented below support Petitioner's cause because:

1) Petitioner has exhausted all administrative and legal remedies for intentional age discrimination and retaliations against Petitioner and his brother. As a last resort for legal remedies, Petitioner appeals to this Court to exercise supervisory power and restore justice because of clear evidence of age discrimination, intentional retaliations, and corruption of the process.

2) Petitioner works for the Navy as career appointment Scientist in the same Code 741, RF Technology Branch, since 1987. On February 4, 2002, both Petitioner Dr. Yuri Stoyanov and his brother Dr. Aleksandr Stoyanov filed first EEO discrimination complaints after promotion was denied to the ND-5 Branch Head Interdisciplinary Manager position in Code 741 in the most egregious act of intentional discrimination against Petitioner (DOB 4/7/1955, born in Russia) when a significantly younger (over 14 years) with far inferior qualifications Defendant Mr. Farley (DOB 5/16/1969, born in Kansas) was promoted by selecting official manipulating selection process.

3) Petitioner was also denied promotions and assignments to at least six ND-5 positions, which were filled without any vacancy announcements when other individuals with inferior qualifications were assigned to a position and secretly promoted under pretext of accretion of duties to cover up intentional age discrimination against Petitioner. The few positions competed through vacancy announcements were also filled by fraud and manipulations of vacancy announcements to deny Petitioner promotion. Petitioner was denied promotions and assignments to at least eleven (11) ND-5 positions while younger employees with inferior qualifications were promoted because of age discrimination against Petitioner by the second-level supervisor Defendant King who was about the same age as Petitioner and his brother Dr. A. Stoyanov.

4) Since February 4, 2002, after Petitioner filed first EEO discrimination complaint, Defendants immediately conspired to escalate discrimination and retaliations against Petitioner and changed Petitioner's work schedule on the same day as the EEO Counselor contacted Defendants on February 21, 2002.

5) One month later, after Petitioner filed formal EEO discrimination complaints in March 2002, Defendants again escalated discrimination and retaliations and by fraud transferred Petitioner Dr. Yuri Stoyanov to another technology department from the department where he worked for over fifteen years. Petitioner filed additional EEO discrimination complaints and reported violations of laws through the chain of Navy command and to US Office of Special Counsel (OSC) in May 2002.

6) Defendants escalated discrimination and retaliations against Petitioner for participation in prior EEO discrimination complaint activities and Whistleblowing. The individual Defendants conspired to deny Petitioner promotion to ND-5 position and retaliated against Petitioner by excluding Petitioner from managing projects, denied directly funded work, interfered with Petitioner's projects, redirected funding, imposed discriminatory requirements, used threats of disciplinary action, denied transfer, incentive pay, and promotion by intentionally denying request for vacancy announcements, concealing, failing to inform, post job announcements, and deceiving in an effort to conceal a promotion opportunity from the Petitioner.

7) Defendants failed to comply with laws and failed to implement the Navy policy of zero tolerance to discrimination in spite of the EEOC finding intentional discrimination against Petitioner's brother. As a result of agency's failure to comply with laws and the Navy policy, Defendants further escalated discrimination and retaliations against Petitioner. Petitioner filed over twenty additional EEO discrimination complaints since 2002, disclosed violations of laws, the Whistleblower Protection Act, abuse of authority through the chain of Navy command, and filed disclosures with the US Office of Special Counsel and appeals with the Merit Systems Protection Board.

8) In 2004, the EEO Commission Office of Federal Operations (EEOC-OFO) upheld found discrimination in the first EEOC case and ordered the agency to take appropriate disciplinary action against the responsible management officials. However, agency again failed to comply with laws

and implement the Navy policy of zero tolerance to discrimination.

9) In June 2005, Petitioner filed civil actions against the Defendants individually and in their official capacity to recover damages and restore justice because of egregious discrimination and violations of Petitioner's rights. Since formal EEO discrimination complaints were filed in 2002, there was no hearing on the crucial age discrimination claims of failure to promote, but the claims were dismissed without a hearing at the EEOC level. The age discrimination and retaliation claims for denied assignments and promotion in the district court were dismissed by summary judgment wrongly concluding "there is no basis in the record from which the court could infer that unlawful discrimination played a role in defendants' selection processes" in establishing the fourth element of the *prima facie* case for disparate treatment in promotion and ignoring clear evidence of age discrimination when significantly younger (by more than 9 years) selectee was promoted.

10) The U.S. Court of Appeals for the Fourth Circuit did not address any issue raised by the Petitioner's appeal but sanctioned wrong and erroneous reasons stated in the district court opinion based on Defendants' intentional material misrepresentations and deceptions. The appeals court decision contradicted its own decisions, decisions of other appeals courts and far departed from this Court's decisions as to call for an exercise of this Court's supervisory power to restore justice and issue a decision in favor of the Petitioner.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

AGE DISCRIMINATION BASED UPON PROMOTION SELECTIONS

Petitioner appeals and presents compelling reasons to grant petition for a writ of certiorari based on the relevant decisions of this Court. In *Reeves v. Sanderson Plumbing Products, Inc, 530 U. S. 133, 140 (2000)*, this Court established what showing a plaintiff had to make regarding pretext in the age discrimination case and, specifically, whether a plaintiff could satisfy his burden by merely rebutting the defendant's explanation for the action. The appeals court for the fourth circuit also had applied the *Reeves* methodology to allow a plaintiff to survive summary judgment and sustained a jury verdict for plaintiff in the failure to promote case. See *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d at 649-50 (4th Cir. 2002). The appeals court held that "the *Reeves* formulation operates based on "the strength of the prima facie evidence in creating an inference of discrimination." *Id* at 648. Petitioner presented ample evidence to defeat Defendants' motion for summary judgment and clearly established an inference of intentional discrimination and retaliations for claims of denied promotions and assignments leading to promotion.

The district court, however, abused discretion and far departed from the accepted decisions of the appeals courts by concluding in the Memorandum Opinion at A11 footnote 3: "Moreover, as to Vacancy Announcement CAR 02-0074, plaintiff was not considered because he failed to indicate an interest in the position in the proper manner," which clearly contradicted and far departed from the appeals court

decision made in *Mauro v. Southern New England Telecomms.*, Inc., 208 F. 3d at 387 (2d Cir. 2000): "requiring the plaintiff to show that he or she applied for the specific jobs at issue would be unrealistic as an employee by definition cannot apply for a job that he or she does not know exists". Moreover, Petitioner presented direct evidence that Defendants deceived or misled Petitioner about the VA CAR 02-0074 in an effort to conceal a promotion opportunity and to deny Petitioner promotion as part of continuous discrimination on bases of age, national origin and in reprisal for participation in protected activities. As the direct evidence of intentional discrimination, desperate treatment, and retaliation against Petitioner showed, Defendant Fowler provided information about the VA CAR 02-0074 to the 38-years old selectee while on the very same day denied such information to the 47-years old Petitioner by explicitly telling Petitioner "to request this type of information" from EEO office "since you have an ongoing EEO case" when the selectee and Petitioner requested information about the available vacancy announcements. In addition, Defendant Fowler deceived or misled the EEO office that there was no vacancy announcement in an effort to conceal a promotion opportunity from Petitioner.

The appeals court sanctioned a departure of the lower court from accepted decisions that was in conflict with the court's own decision in *Williams v. Giant Food Inc*, 370 F.3d 423 (4th Cir. 2004), which reversed the district court's summary judgment concluding that *Williams* created a genuine issue of material fact relevant to her failure-to-promote claims and can establish a *prima facie* case if she can show that she was unaware of the promotion

opportunities because the company did not follow its own policy.

Furthermore, Petitioner clearly established strong *prima facie* case of age discrimination and retaliation in this case. In fact, the EEO Commission found that Petitioner "established a prima facie case of age, national origin and reprisal discrimination" for most of the Petitioner's claims. However, the district court abused discretion and far departed from the accepted decisions of the appeals court by ignoring evidence for the fourth elements of a *prima facie* case and concluding in the Memorandum Opinion at A12 (see Appendix): "there is no basis in the record from which the court could infer that unlawful discrimination played a role in defendants' selection processes" contrary to the direct evidence of desperate treatment and the clear evidence of intentional age discrimination when Petitioner specifically challenged the selection process since the position was filled by a significantly younger (more than 9 years) selectee who did not participate in protected activities. The appeals court did not address the issue of intentional age discrimination and retaliations, but sanctioned a departure of the lower court from the accepted decisions that call for an exercise of this Court's supervisory power.

The district court further abused discretion and far departed from the accepted decisions by concluding in the Memorandum Opinion at A12: "even assuming that plaintiff had established a *prima facie* case, he cannot refute the legitimate, non-discriminatory explanations defendants have offered for their appointments" clearly contradicting undisputed evidence that Petitioner was the most qualified with a Ph. D. in physics and over 16 years

of experience in the technology required for the position while significantly younger selectee had no such qualifications and experience and, in fact, the selectee admitted that her technical background was not strong enough for a promotion and she did nothing to strengthen her technical background. Furthermore, the district court abused discretion by concluding in the Memorandum Opinion at A12: "[i]n sum, Stoyanov urges the court to substitute its judgment, or more accurately Stoyanov's, for that of his employer on no more basis than plaintiff's own assertions that he is the most qualified candidate," clearly contradicting the evidence presented and making a decision about a question of fact for the jury, which could return a verdict in favor of Petitioner. The district court far departed from the accepted decision of this Court recent finding that an employee's claimed superior qualifications for the position sought could show that the employer's articulated reasons were pretextual. See *Ash v. Tyson Foods, Inc., 126 S. Ct. 1195* decided on February 21, 2006.

In addition, Petitioner presented direct evidence of the selecting official's discriminatory attitude based on Petitioners' age. The direct evidence of discriminatory attitude expressed in the email of the selecting official 46-years old Defendant King about "real paucity of employees in the 26 to 36 year age bracket," distress for being above the average age of 44, and "need for fresh ideas and enthusiastic energy of new employees" was ignored by the district court, wrongly referring in the Memorandum Opinion at A12 to *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845 848 (4th Cir. 1 988)("naked opinion, without more, is not enough to establish *a prima facie* case

of[] discrimination. Conclusory assertions that: [defendant's] state of mind and motivation are in dispute are not enough to withstand summary judgment."), which was different from the circumstances in the current case. The undisputed direct evidence in this case showed that the district court far departed from the accepted decisions since "direct evidence would be what [the selecting official] said or did in the specific employment decision in question." See *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). A departure of the lower court from the accepted decisions with regard to the direct evidence of age discrimination and discriminatory attitude towards Petitioner was based on defendants' arguments void of any supporting evidence. The undisputed evidence of discriminatory attitude because of Petitioners' age and a pattern and practice of age discrimination when Defendant King did not select or assign the most qualified Petitioner to a number of positions, but selected the youngest and the least qualified individuals, were sufficient to defeat summary judgment. Petitioner presented ample evidence of a pattern and practice of age discrimination against him as a series of secret promotions of younger employees with inferior qualifications than Petitioners' qualifications under the pretext of "accretion of duties" in an effort to conceal a promotion opportunity from Petitioner. The undisputed evidence of a pattern and practice of age discrimination in a series of denied promotions and assignments to the positions leading to promotion established disparate treatment and created an inference of age discrimination against Petitioner because promotions under the "accretion of duties" were unknown to Petitioner and were

made secretly in violation of the agency own regulations specifically requiring that "[t]he potential for future promotion must be made known to all potential applicants". The district court further abused discretion by concluding in the Memorandum Opinion at A11 footnote 3: "As a matter of law, the record reflects that several of these alleged non-promotions were not promotional opportunities at all, but rather were mere discretionary reassignments" contrary to the undisputed evidence that assignments were to positions of higher responsibility leading to promotion. Plaintiff was unaware of the promotion and assignment opportunities and in fact the vacancy announcement was not posted for the LHA(R) and DD (X) Signature Coordinator positions contrary to the policy to compete positions and assignments leading to promotions, while the CVNX position was competed and Plaintiff applied for the assignment with 11 other candidates. In addition, the district court further abused discretion by concluding in the Memorandum Opinion at A12 footnote 4: "[h]owever, the court does not assume plaintiff's qualifications as to the December 2002 selection for interdisciplinary engineer," contrary to the evidence clearly establishing that plaintiff was qualified for the position and the undisputed evidence, which showed that the panel members were aware about plaintiff's participation in protected activities and unfairly rated plaintiff' application "one of the lowest", which created an inference of bias, unlawful discrimination, and a jury question because the subjective process of evaluation and the contrast in ratings of the Plaintiff's application were indistinguishable from intentionally discriminatory practices as this Court

concluded in *Watson v. Fort Worth Bank and Trust*, 487 U.S. 989 (1988). The clear focus of the *Watson's* opinion is not the degree to which subjective discretion is tolerated, but instead the subjective criteria in the selection can have deleterious effects that are indistinguishable from intentionally discriminatory practices. The appeals court did not address any issue of intentional age discrimination and retaliations against Petitioner, but sanctioned obvious departure of the lower court from the court's own decision in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d at 760-61 (4th Cir. 1998), finding that an individual plaintiff may "use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination within the McDonnell Douglas framework."

The district court ignored direct evidence of the discriminatory attitude based on Petitioners' age, reprisals, undisputed evidence of disparate treatment, deceptions, deliberate misrepresentations and the pattern and practice of age discrimination against Petitioner in a series of promotions of younger employees with inferior qualifications than Petitioner's qualifications in addition to the direct evidence of intent to escalate discrimination and retaliations that were highly relevant and clearly probative to the existence of discriminatory attitude and discriminatory motive towards Petitioner. The appeals court did not address these issues and sanctioned a departure of the lower court from the accepted decisions regarding direct evidence of discriminatory attitude and disparate treatment because of Petitioners' age, national origin and participation in protected activities. As this Court held in *Smith v. City of Jackson*, 544 U.S. 228 (2005),

the ADEA authorizes recovery on disparate impact claims, comparable to the claim established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which announced a disparate impact theory of recovery under Title VII cases. Accordingly, Petitioner respectfully requests an exercise of this Court's supervisory power to restore justice and vacate the appeals court decision, which did not address any issue raised by Petitioner, but sanctioned wrong district court opinions and decisions that conflicted and far departed from this Court's decisions and decisions of the appeals courts.

RETALIATIONS FOR PARTICIPATION IN PROTECTED ACTIVITIES

The district court decision with regard to retaliation claims also conflicted and far departed from this Court's decision in *Burlington N. & S.F. Ry. v. White*, *26 S. Ct. 2405, 2415 (2006)*. The undisputed evidence showed that Defendants retaliated against Petitioner and denied promotion, did not assign Petitioner to positions of higher responsibility to deny career ladder opportunities to Petitioner and opportunity to reach true potential at the agency; denied incentive pay demo points, time to work on EEO discrimination complaints, restoration of annual leave; and deliberately interfered with Petitioner's work by denying Petitioner's request for transfer and redirecting funding from Petitioner to work on the ILIR and Malibu antenna projects, which Petitioner proposed and got the funding to do proposed work. The district court abused discretion and far departed from this Court's decision concluding in the Memorandum Opinion at A9 in footnote 2: "To the extent that these events are

sufficiently material and adverse to be cognizable under Title VII, they suffer from the same evidentiary deficiencies as the failure to promote claims discussed below" clearly contradicting this Court's conclusion that the anti-retaliation provisions are violated whenever the employer responds to protected activity in such a way that a reasonable employee would have found the challenged action materially adverse. See *White, 26 S. Ct. at 2415.*

The district court abused discretion and clearly misconstrued the claim of denied incentive pay demo points concluding: "There is, manifestly, no probative evidence that the award of one point to plaintiff was discriminatory or retaliatory" contrary to the claim of denied additional incentive pay and undisputed evidence of retaliation for Petitioner's participation in EEO and Whistleblowing activities. Petitioner presented direct evidence of Defendants' intent to escalate retaliations and Defendants' conspiracy to escalate discrimination and retaliations in the September 30, 2002 email when Defendant Jebsen instructed subordinates: "It's time to crack down on them [Petitioner and his brother]... Dave Caron has mentioned it twice now." In November 2002, Defendants denied Petitioner time to work on EEO discrimination complaints, incentive pay, and restoration of annual leave. The direct evidence and demonstrably discriminatory motive to retaliate against Petitioner were sufficient to defeat summary judgment besides the raised question of Defendants' credibility that should be decided by a jury during the trial. The nexus of Plaintiff's participation in protected activities and the cumulative effect of a pattern and practice of intentional discrimination

and antagonism prove causation by looking at the evidence as a whole because "[a] discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990).

Petitioner established strong *prima facie* cases of intentional discrimination and retaliations under ADEA, Title VII, and WPA presenting ample evidence of intentional retaliations because of Petitioner's participation in prior EEO and Whistleblowing activities. Petitioner's strong *prima facie* cases of retaliations and close temporal proximity between Petitioner's protected activities and the adverse employment actions against Petitioner in addition to the direct evidence of intent and conspiracy to escalate retaliations, including the pattern or practice of intentional discrimination and retaliations against Petitioner and by looking at the evidence as a whole proved causation and created an inference of retaliations. In addition, Petitioner showed that Defendants proffered pretext unworthy of credence. However, the district court decisions conflicted and far departed from accepted and usual course of judicial proceedings by granting Defendants' motion for summary judgment contrary to the direct evidence of a systematic policy and practice of discrimination and retaliations, failure to take immediate remedial measures, and a series of related distinct acts of intentional discrimination and retaliations against Petitioner during administrative processing of the Petitioner's EEO discrimination complaints. Accordingly, Petitioner respectfully submits a writ of certiorari for an exercise of this Court's supervisory power to restore justice.

CONCLUSION

Wherefore, in consideration of the above, Petitioner respectfully submits petition for a writ of certiorari for the Court's decision to grant the petition and vacate the appeals court decision that sanctioned wrong and erroneous reasons stated in the district court opinions. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Date 04/07/09

Yuri Stoyanov

Yuri Stoyanov

APPENDIX

FILED: January 15, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08—2040
(1: 06—cv—01244—AMD)

YURI J. STOYANOV,
Plaintiff - Appellant

V.

DONALD C. WINTER, Secretary of the Navy; STEPHAN W. PETRI, Individually and in his Official Capacity as Head of the Carderock Division; GARY M, JEBSEN, Individually and in his Official Capacity as the Head of Code 70 Carderock Division; KEVIN N. WILSON, Individually and in his Official Capacity as the Acting Head of Code 74 Carderock Division; JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74 Carderock Division; JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74 Carderock Division; MATHEW CRAUN, Individually and in his Official Capacity as the Head of Code 722 Carderock Division; PAUL SHANG, Individually and in his Official Capacity as the Head of Code 72 Carderock Division; GERALD SMITH, Individually and in his Official Capacity as Deputy Head of Code 70 Carderock Division; ROGER FORD, Individually and in his Official Capacity as the Head of Code 7014 Carderock Division; N. KATHLEEN FOWLER, Individually and in her Official Capacity as

Administrative Officer Code 709; DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39; JOSEPHINE MCGRATH, Individually and in her Official Capacity as Complaints Manager/Acting Deputy EEO Chief Code 034,

Defendants – Appellees

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08—2040

YURI J. STOYANOV,
Plaintiff - Appellant,

V.

DONALD C. WINTER, Secretary of the Navy; STEPHAN W. PETRI, Individually and in his Official Capacity as Head of the Carderock Division; GARY M. JEBSEN, Individually and in his Official Capacity as the Head of Code 70 Carderock Division; KEVIN M. WILSON, Individually and in his Official Capacity as the Acting Head of Code 74 Carderock Division;

JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74 Carderock Division; JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74 Carderock Division; MATHEW CRAUN, Individually and in his Official Capacity as the Head of Code 722 Carderock Division; PAUL SHANG, Individually and in his Official Capacity as the Head of Code 72 Carderock Division; GERALD SMITH, Individually and in his Official Capacity as Deputy Head of Code 70 Carderock Division; ROGER FORD, Individually and in his Official Capacity as the Head of Code 7014 Carderock Division; M. KATHLEEN FOWLER, Individually and in her Official Capacity as Administrative Officer Code 709; DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39; JOSEPHINE MCGRATH, Individually and in her Official Capacity as Complaints Manager/Acting Deputy EEO Chief Code 034,

Defendants — Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Andre M. Davis, District Judge. (1:06-cv-0 124 4—AMD)

Submitted: January 13, 2009
Decided: January 15, 2009

Before WILLIAMS, Chief Judge, and TRAXLER and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Yuri J. Stoyanov, Appellant Pro Se.

John Walter Sippel, Jr., Assistant United States Attorney, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Yuri J. Stoyanov appeals the district court's order dismissing his claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e to 2000e—17 (2000), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §~ 621 to 634 (2000), the Whistleblower Protection Act, 5 U.S.C. §~ 1214, 1221 and 2302 (2006), and various state law tort claims, as well as its order denying his Fed. R. Civ. P. 59(e) motion for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's orders, See Stoyanov v. Winter, No, 1:06—cv—01244-AMD (D. Md. Aug. 11, 2008; Aug. 27, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

YURI J. STOYANOY,
Plaintiff

v. Civil No. AMD 06-1244

GORDON R. ENGLAND, SECRETARY
OF THE NAVY, et al.,
Defendants

ORDER

Plaintiff's "Motion to Reconsider the August 11, 2008 Order and Amend the Judgment" has been carefully reviewed. For the reasons previously explained in the Court's Memorandum Opinion, it is this *27th* day of August, 2008, by the United States District Court for the District of Maryland, ORDERED

(1) The "Motion to Reconsider the August 11, 2008 Order and Amend the Judgment" is DENIED; and it is further ORDERED

(2) The Clerk SHALL MAIL a copy of this order to plaintiff pro *se*.

ANDRE M. DAVIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

YURI J. STOYANOV,
Plaintiff

V. Civil No. AMD 06-1244

GORDON R. ENGLAND, SECRETARY
OF THE NAVY, et al,
Defendants

ORDER

For the reasons set forth in the foregoing Memorandum Opinion, it is this 11th day of August,

2008, by the United States District Court for the District of Maryland, ORDERED

(1) The motion to dismiss or in the alternative for summary judgment (Paper No.30) is GRANTED and JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS AGAINST PLAINTIFF; and it is further ORDERED

(2) The Clerk SHALL MAIL a copy of this order to plaintiff pro se and CLOSE THIS CASE.

/s/
ANDRE M. DAVIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

YURI J. STOYANOV,
Plaintiff

V. Civil No. AMD 06-1244

GORDON R. ENGLAND, SECRETARY OF THE NAVY, et al,
Defendants

MEMORANDUM OPINION

This case is the second of seven federal employment discrimination actions instituted by pro se plaintiff Yuri Stoyanov in this court. Plaintiff is employed by the Department of the Navy. In this (and in all of his other actions) plaintiff alleges, *inter alia*, that he suffered discrimination in the workplace based on national origin and age, and that lie has been the victim of retaliation for his involvement in protected activity. As is sometimes true in federal employment

discrimination actions, in this ease the administrative record created prior to the commencement of the judicial action is substantial. Even more fundamentally, because plaintiff has pyramided his claims and filed judicial actions *seriatim* while incorporating earlier allegations into later complaints, the prior adjudications of plaintiff's claims necessarily narrow the scope of subsequent claims. Accordingly, although there has been no discovery, defendants' motion to dismiss, or in the alternative, for summary judgment, treated here as a motion for summary judgment, is entirely appropriate. Plaintiff has filed opposition papers which are voluminous. Oral argument is not necessary. For the reasons that follow, the motion shall be granted.

Stoyanov was born in the former U.S.S.R. on April 7, 1955, and became a United States citizen in 1984. *Compl.* ¶33. After his receiving doctorate degree in physics, plaintiff began his employment as a Scientist with the Department of the Navy, Naval Surface Warfare Center, Carderock Division ("NSWCCD") on September 1, 1987. *Compl* ¶1 34,36. During the period relevant to this action Steven Petri served as the head of NSWCCD.
Gary Jebsen, Gerald Smith, Roger Ford, Kevin Wilson, James King, John Davies, Paul
Shang, and Mathew Craun were heads of various units at NSWCCD and plaintiff's superiors.
Compl ¶~12,13,15-20. Mary Fowler was an Administrative Officer, Josephine McGrath was the EEO Complaints Manager, and David Caron was the Assistant Counsel to NSWCCD. *Compl* ¶1 14, 21, 22. Plaintiff names all of these individuals, as well as the Secretary of the Navy, as defendants in this action.

I

Stoyanov contends that "at all relevant times [he] received favorable performance evaluations and performed his job in [a] superb manner receiving performance and service awards for outstanding service and exemplary performance." *Compl* ¶ 37. Nonetheless, he alleges, he was repeatedly passed over for promotions and favorable reassignments, and deprived of leave, among other adverse actions. These adverse actions were allegedly taken against him either out of animus related to plaintiff's age and national origin, or in retaliation for plaintiff's vocal opposition to discrimination he experienced.

II

Plaintiff filed his first formal charge of discrimination in March 2002; the present action encompasses the allegations of his second EEO complaint, filed sometime thereafter, *Compl* ¶1 24,51, and relates to events and alleged adverse employment actions occurring between Spring 2002 and Winter 2002. In any event, the relevant procedural/factual context of this and the multitude of related cases filed by the plaintiff (and his twin brother) is described in detail in earlier opinions by this court, *see Stoyanov v. Winter,* 2006 WL 5838450 (D.Md. July 25, 2006) (Bennett, J.)(granting in part and denying in part defendants' motion to dismiss two consolidated cases, one for each brother, arising out of their first administrative charge of discrimination); *id.,* 2007 WL 2359771 (D.Md. Aug. 15, 2007) (Bennett, J.) (granting defendants' post-discovery dispositive motion and entering judgment for defendants in consolidated cases), *aff'd,* 2008 WL 501275 (4th Cir. Feb. 25, 2008) (unreported)(affirming judgment in favor of defendants); and the United States Court of Appeals for the Federal Circuit, *Stoyanov v. Merit Systems Protection Bd.,* 2007 WL

444806 (Fed. Cir. April 16, 2007)(unpublished) (affirming dismissal of Whistleblower Act claims), *cert. denied,* 128 S.Ct. 247(2007). That history need not be repeated here. *See also Stoyanov v. Merit Systems Protection Rd.,* 474 F.3rd 1377 (Fed. Cir. 2007)(affirming dismissal of brother's Whistleblower Act claims), *cert. denied,* 128 S.Ct. 247 (2007).
As mentioned above, this is plaintiff's second (of seven) judicial actions for relief, which grows out of his second charge of discrimination.[1] What is perfectly apparent is that the prior opinions and orders by Judge Bennett in plaintiff's earlier case, *see* 2006 WL *5838450* (D.Md. July *25,* 2006) and 2007 WL 2359771 (D. Md. Aug. 15, 2007), as affirmed by the Fourth Circuit, 2008 WL 501273 (4th *Cii.* Feb. *25,* 2008)(unreported), leaves very little to he adjudicated here, The court agrees with defendants that the only properly exhausted, cognizable discrimination/retaliation claims in this iteration of plaintiff's many complaints are those mentioned below.

III

The core of Stoyanov's case is employment discrimination. The gravamen of these claims is that, on the basis his age, 'national origin and/or in retaliation for his having engaged in protected activity, the Navy refused to promote or reassign plaintiff.[2]

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[1] In Orders entered by Judge Bennett and reconfirmed by this author, the court has limited plaintiff and his brother to one active case at a time. *See* docket no.52, Order of July 23, 2008.

[2] Stoyanov also complains of several other events related to his employment which, he contends, are adverse employment actions. First, plaintiff complains that defendants denied him sufficient time and use of government resources to work on his various EEOC cases.

Plaintiff feels aggrieved by his inability to secure a promotion to an ND-5 level position, or a reassignment that might lead to a. better opportunity for such a promotion, in some cases because he was allegedly denied the opportunity to apply and in others because another candidate was selected over plaintiff. He essentially argues that every occasion on which an ND-5 vacancy became available and he was not promoted was an incident of discrimination. In that connection he catalogs the following vacancies which were filled by other applicants:

- In September 2002, a thirty-eight year old, American-born candidate was promoted to Deputy Head of O5T1 over plaintiff
- In October 2002, another candidate was promoted

Compl ¶89. Second, Stoyanov alleges that, in April 2003, defendants "denied plaintiff funding by redirecting 6.1 ILIR program work" *Compl.* ¶90. Finally, plaintiff complains of being transferred from Ship Electromagnetic Signature Technology (Code 74) to Submarine Acoustics (Code 72) and that his request to be transferred back to his original work group was denied. *Compl.* ¶¶46, 91. To the extent that these events are sufficiently material and adverse to be cognizable under Title VII, they suffer from the same evidentiary deficiencies as the failure to promote claims discussed below.

Plaintiff also feels aggrieved because he was awarded only one "demo point" based on his work performance during Fiscal 2002, and certain annual leave was not restored. The record shows that some of plaintiff's co-workers received no "demo points" and some received more than one. There is, manifestly, no probative evidence that the award of one point to plaintiff was discriminatory or retaliatory. Moreover, no other employee working for plaintiff's supervisor received a restoration of annual leave, This claim fails as a matter of law.

to Acting Head of Code 74

- In October 2002, plaintiff was denied the opportunity to apply for Total Ship Survivability Coordinator for which a thirty-eight year old, American-born candidate was selected
- In October 2002, plaintiff was denied the opportunity to apply for DD(X) Gold Team Signature Coordinator for which an American-born candidate was selected
- In December 2002, plaintiff was not selected for promotion to Interdisciplinary Engineer, ND-5[3]

Defendants argue, and this court agrees, that Stoyanov is unable to demonstrate his employment discrimination claims through direct evidence. Accordingly, the familiar burden-shifting framework of *McDonnell Douglas* applies to plaintiff's Title VII and ADEA claims. *McDonnell Douglas Corp. v. Green,* 411 U.S. 791,802(1973); *Caussade v Brown,* 924 F.Supp. 693. 698 (D. Md. 1996), *aff'd,* 107 F.3d 865 (4th Cir. 1997).

The first step in the *McDonnell Douglass* analysis requires plaintiff to establish a *prima facie* case of discrimination. *McDonnell Douglas Corp.,* 411 U.S. at 802. Plaintiff's claim is for disparate treatment, principally in promotion, requiring him to demonstrate by a preponderance of the evidence that "(1) []he is a member of a protected class; (2) [his] employer had an open position for which []he applied or sought to apply; (3) [he was qualified for the position; and (4) []he was

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[3] As a matter of law, the record reflects that several of these alleged non-promotions were not promotional opportunities at all, but rather were mere discretionary reassignments. Moreover, as to Vacancy Announcement CAR 02-0074, plaintiff was not considered because he failed to indicate an interest in the position in the proper manner.

rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *Evans v. Technologies Applications & Svc. Co.*. 80 F.3d 954, 959-60 (4th Cir. 1996); *Foreman v. Weinstein,* 485 F.Supp.2d 608,613 (D. Md. 2007).

Stoyanov is plainly able to establish the first and second elements of a *prima facie* case and the court assumes, *arguendo,* that he can satisfy the third requirement.[4] However, there is no basis in the record from which the court could infer that unlawful discrimination played a role in defendants' selection processes. Plaintiff has not produced any meaningful evidence to suggest that his age, Russian origin, or prior complaints were factors in his inability to secure a promotion to an ND-5 level position. Stoyanov's arguments are based on his own conspiratorial theories and conclusory leaps in reasoning rather than evidence. *See Goldberg v. B. Green and Co., Inc.,* 836 F.2d 845 848 (4th Cir. 1 988)("naked opinion, without more, is not enough to establish *a prima facie* case of[] discrimination. Conclusory assertions that: [defendant's] state of mind and motivation are in dispute are not enough to withstand summary judgment."). Furthermore, even assuming that plaintiff had established a *prima facie* case, he cannot refute the legitimate, non-discriminatory explanations defendants have offered for their appointments.

In sum, Stoyanov urges the court to substitute its judgment, or more accurately Stoyanov's, for that of

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[4] However, the court does not assume plaintiff's qualifications as to the December 2002 selection for interdisciplinary engineer. Among the more than two dozen applicants screened by a neutral panel for that selection, plaintiff was rated one of the lowest and was not selected for interview. As a matter of law, the claim fails.

his employer on no more basis than plaintiff's own assertions that he is the most qualified candidate. *See DeJarnette v. Corning, Inc.*, 133 F.3d 293,298(4th Cr. 1998)("Title VII is not a vehicle for substituting the judgment of a court for that of the employer."). No reasonable factfinder could return a verdict in favor of Stoyanov on this record, therefore summary judgment in favor of defendants is appropriate as to each of the cognizable discrimination and retaliation claims.

IV

For the forgoing reasons, and those set forth in the opinions of Judge Richard D. Bennett at 2006 WI, 5838450 (D.Md. July 25, 2006), and 2007 WL 2359771 (D.Md. Aug. 15, 2007), defendants are entitled to judgment as a matter of law. An Order follows.

Filed: August 11, 2008 /s/
Andre M. Davis
United States District Judge